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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973
No. 73-1682

SAMUEL BLANK,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Respondent, People of the State of California, respectfully prays that a writ of certiorari to review the judgment of the Court of Appeal of the State of California, entered

against Petitioner in the above-entitled case on January 25, 1974, not issue.

OPINIONS BELOW

No written opinion was rendered by the Appellate Department of the Superior Court of the State of California for the County of Los Angeles, on the judgment entered in the above-entitled action on January 25, 1974.

JURISDICTION

The judgment of the Appellate Department of the Superior Court for the State of California for the County of Los Angeles was entered January 25, 1974. A copy of the judgment appears in Appendix A of Petitioner's writ. A due and timely petition for rehearing or, in the alternative, for certification of the cause to the Court of Appeal was denied by the said Appellate Department on February 11, 1974. A copy of the said order appears in Appendix

of Petitioner's writ.

By the aforesaid denial of the petition for rehearing or, in the alternative, for transfer to the Court of Appeal, the Appellate Department of the Superior Court of the State of California for the County of Los Angeles became the highest court of the State in which a decision could be had. See, California Penal Code § 1471; California Rules of Court, Rules 24(a) and 28(b); Smith v. California, 361 U.S. 147, 148, fn. 2; Virginia Ry. Co. v. Mullins, 271 U.S. 220, 222.

QUESTIONS PRESENTED

1. Whether Petitioner's conviction for violation of California Penal Code Section 311.2, is violative of First and Fourteenth Amendments and the decisions of this court rendered on June 21, 1973, in Miller v. California, 413 U.S. 15; Kaplan v. California, 413 U.S. 139; United States v. 12 200-Ft.

Reels, 413 U.S. 123.

2. Whether that portion of California's test of obscenity that the matter be "utterly without redeeming social importance" renders California Penal Code Sections 311 and 311.2 violative of the First and Fourteenth Amendments because of vagueness, ambiguity, uncertainty and overbreadth.

3. Whether the Petitioner's conviction, based on statewide contemporary standards of prurient interest and customary limits of candor, rather than national standards, violates the First and Fourteenth Amendments.

4. Whether the provisions of California Penal Code Sections 311 and 311.2, which do not specifically define the exact sexual conduct which must be depicted or described in order to come within the provisions of said sections, are vague, uncertain, overbroad and ambiguous, in violation of the First and Fourteenth Amendments.

5. Whether the jury was properly instructed in light of this court's decisions of June 21, 1973 in Miller v. California, 413 U.S. 15; Kaplan v. California, 413 U.S. 115; Paris Adult Theatre I v. Slaton , 413 U.S. 49; United States v. Orito, 413 U.S. 139; and United States v. 12 200-Ft. Reels, 413 U.S. 123.

6. Whether California Penal Code Sections 311 and 311.2, on their face and as construed and applied, require proof of scienter, and whether such evidence was sufficient in this case.

7. Whether the matter exhibited by the Petitioner, which resulted in his conviction, was in fact obscene.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First and Fourteenth Amendments to the Constitution

of the United States and the pertinent provisions of California Penal Code Sections 311 and 311.2 appear in Appexdix C of Petitioner's petition.

STATEMENT OF THE CASE

Petitioner was convicted of a violation of Penal Code Section 311.2 based on the exhibition, in a coin-operated arcade type machine, located in an "adult" bookstore, of a film. California Penal Code Section 311.2 states in relevant part:

> ". . . where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the

conclusion that the matter is utterly without redeeming social importance."

There were signs in front of Petitioner's bookstore giving notice of the character of material to be found inside. Petitioner was shown to be specifically aware of the actual contents of two magazines and of films he had for sale. The arcade movie machines had pictures of nude people on them, and were visible from Petitioner's position in the store. One person was seen masturbating while viewing a film, and this was visible to Petitioner. All of the machines had semen stains on them. Petitioner held permits issued by the City of Los Angeles for said machines. The film responsible for Petitioner's conviction consisted of an approximate 15 minute 8 m.m. silent color film, plotless, graphically depicting an heterosexual orgy between 3 people.

Following conviction, Petitioner was

sentenced to fifteen days in the county jail, 180 days suspended, three years summary probation and a fine of $800.00 plus penalty assessment.

Petitioner filed an appeal with the Appellate Department of the Superior Court of the State of California for the County of Los Angeles. The case was argued and submitted prior to June 21, 1973, but subsequently submission was vacated until after the Miller, et. al. cases were decided.

Following the decisions of this court on June 21, 1973 in Miller v. California, 413 U.S. 15, et. al; the Court of Appeal of the State of California affirmed in a case entitled People v. Enskat, 33 Cal. App. 3d 900, 109 Cal. Rptr. 433, that California Penal Code Sections 311 and 311.2 were constitutional and enforceable as a result of the Miller decision.

The court held that the state obscenity

statute, as construed, could continue to be applied in state obscenity prosecutions. Enskat's petition for hearing to the California Supreme Court was denied on October 24, 1973.

Following the ruling of this court in Miller, and the aforesaid ruling in Enskat, this case was re-argued before the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

On January 25, 1974 the judgment of conviction was affirmed without opinion. Petition for rehearing and/or certification of transfer was filed by Petitioner in the said Appellate Department of the Superior Court and denied on February 11, 1974.

Thereafter, a remittitur issued from the Appellate Depatment, but on April 16, 1974, the court ordered recall of the said remittitur and stayed the issuance of the remittitur to and including May 15, 1974, to permit

petitioner to file a petition for a writ of certiorari in the Supreme Court of the United States. Petitioner's writ was filed May 9, 1974.

Respondents now reply with this writ in opposition to granting of writ of certiorari.

REASONS FOR DENYING THE WRIT

1. California Penal Sections 311 and 311.2 define as obscene matter which, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in sex, nudity or excretion; and is matter which, taken as a whole, goes substantially beyond customary limits of candor in the depiction or representation of sex or nudity; and is matter which, taken as a whole, is utterly without redeeming social importance.

It is incorrect to state, as does Petitioner,

that the statute solely embodies the test set forth in Memoirs v. Massachusetts, 383 U.S. 413, 16 L.Ed.2d 1, 86 S.Ct. 975, inasmuch as the statute was enacted in 1961 and Memoirs was decided in 1966, some five years later. The California legislature merely adopted part of the definition of obscene matter set forth in Roth v. United States, 354 U.S. 476, 1 L.Ed. 2d 1498, 77 S.Ct. 1304 as one of the elements of the crime set forth in Penal Code Section 311.2. (Zeitlin v. Arnebergh (1963) 59 Cal.2d 901, 383 P.2d 152, 31 Cal.Rptr. 800.)

2. The court in Enskat did not speak to the question of whether Penal Code Section 311 was specific enough on its face to meet the requirements of Miller, et.al., but instead limited itself to a consideration of whether it had been authoritatively construed so as to meet such requirements. The court in Enskat did not consider whether the

California statute, on its face, was directed at depiction of defined sexual conduct, as opposed to expression (Miller v. California, 37 L. Ed. 2d at 430, fn. 6), or whether it was an existing state statute which "conveys sufficiently definite warning as to the proscribed conduct when measured by common under standing and practices." (Miller v. California, 37 L. Ed. 2d at 433, fn. 10.) While Miller has been apparently interpreted as inferring that California Penal Code Section 311 is not specific enough on its face, Respondent submits that it is somewhat more specific than other statutes which have been saved, such as 19 USC Section 1305 (a) and 18 USC Section 1462 (U. S. v. 12- 200 Ft. Reels, 413 U. S. 123).

The court in Enskat ruled that California Penal Section 311 and 311. 2, as they had been authoritatively construed in the past, were valid in light of Miller, et. al. With this

conclusion, Respondent agrees.

Part of the test of obscenity under which Petitioner was convicted was the requirement that the matter be shown to be "utterly without redeeming social importance." As this court correctly pointed out in Miller (37 L. Ed. 2d at 429), this test called on the prosecution to prove a negative, ". . . a burden virtually impossible to discharge under our criminal standards of proof." Nevertheless, the prosecution did so in this case, and the test of which Petitioner now complains is one which, until now, he has been content, if not delighted, with for 13 years.

Petitioner has seized upon the fact that this court reduced the prosecution's burden to claim that California's statute, containing, as it does, such a test, is obviously unconstitutional on its face. The most direct answer to this claim is that if it were correct, this court would have so held in Miller, supra.

What this court did with regard to the test is that it said it is no longer required as stated, and made permissible a new element which is both more realistic, more semantically intelligible, and, as a consequence, easier for the prosecution to establish.

Respondent submits that nothing this court said in Miller, et. al., can be fairly construed to imply that a conviction based partly on a required finding that the matter was utterly without redeeming social importance can be said to be constitutionally invalid.

3. Petitioner's trial was conducted, and his conviction was obtained, upon a theory that a national standard of First Amendment protection applied. (Miller v. California) Also, as in Miller, proof of contemporary standards of prurient interest and customary limits of candor, the so called "community standard", was of such standards as they existed in the entire State of California, and

not of some smaller area or of the entire nation.

Both of these concepts were aproved by this court in Miller, et. al., and both of them continue to be applied in California today. It seems to Respondent that Petitioner fails to distinguish between the two concepts in his argument.

If one accepts Petitioner's theory that a national standard of First Amendment protection is now "clearly unconstitutional", and only a statewide standard can apply, it is difficult to see how this or any other obscenity case can possibly present a federal question. Actually, this court left unsettled the question of how small a geographic area may be and still establish a viable standard (albeit of pruriency and limits of candor). Under Petitioner's theory, the standard of First Amendment protection may end up as small as a jury box. Respondent doubts that

Petitioner seriously desires this.

4. There exists no express authority for Petitioner's proposition that California Penal Code Sections 311 and 311.2 do not on their fact meet the specificity requirements of Miller. Rather, it must be inferred from this court's opinions in Miller and Kaplan, and from the fact that the court in Enskat addressed itself only to the question of how the statute had been construed. Since this court stated that a statute might be valid as written or construed, and left the question up to the Orange County Superior Court in Miller and the Los Angeles County Superior Court in Kaplan, Petitioner's argument that the statute is not specific on its face is without merit because it does not address itself to the question of whether it has been properly construed.

5. Petitioner seems to argue as if his case were tried according to the standards

set forth in Miller, et.al., but by virtue of the California statute. The fact is, the standards of proof met by the prosecution in Petitioner's case were much more stringent than those which Miller allows. The record in this case utterly and completely refutes Petitioner's contention that the jury was requested to "substitute its own subjective and unguided predictions" or licensed to create its own law of the case, its own personal standards." The falsity of this contention is demonstrated by the fact that Petitioner makes this astounding allegation for the first time in his petition to this court.

In Miller, et.al., it is implicit that a conviction under Penal Code Section 311.2 could be sustained, at the very least, if the statute had been authoritatively construed as was the statute in United States v. 12-200 Ft. Reels, supra. The court in Enskat determined that California's obscenity statutes had been so

"authoritatively construed" and Respondent submits that Petitioner's contention in this regard lacks merit.

6. As previously stated, the court in Enskat held that, prior to the date Petitioner violated California Penal Code Section 311.2, California's obscenity statutes had been authoritatively construed in such a manner as satisfied the requirements of Miller, et.al. Petitioner urges that this is not so, but it seems to Respondent that he is merely attempting to substitute his judgment for that of the California Court of Appeal and the California Supreme Court.

In the first place, it seems to Respondent that this court intended by its order in Miller, et.al., that the question be left to state courts to decide. Petitioner has made no showing that the California Supreme Court and Court of Appeal are not to be trusted to carry out the mandate of this court.

To grant this petition would be tantamount to an expression of willingness by this court to review practically every previous obscenity case from each of the 50 States of the Union.

Second, it seems clear from the opinion that the California obscenity statute had been authoritatively construed so as to meet requirements even more stringent than those imposed by Miller and United States v. 12-200 Ft. Reels.

Finally, Petitioner urges that an "authoritative judicial construction" could only have issued from the California Supreme Court, and no lower court, in only one case, specifically reading into the statute particular types of sexual conduct which might not be depicted or described. In fact, the California Supreme Court has cited People v. Enskat, supra, as authority for the proposition that California Penal Code Sections 311 and 311.2 are

constitutional in light of Miller, et. al., In re Koomer, Crim. No. 17835, July 3, 1974.

Petitioner misunderstands this court's ruling of June 21, 1973, if he believes they held prior requirements for judging obscenity constiutionally deficient. This court would have reversed, rather than remanding. This court remanded for the purpose of the state court determining whether its statute had been properly construed; in California's case the court's instructions were carried out and the question properly settled.

7. California Penal Code Section 311.2 makes it an offense to "knowingly" exhibit any obscene matter. The trial court correctly instructed the jury that "knowingly" means that the Petitioner knew the "character of the contents of the material in question." To comply with the statute there need not have been knowledge of the matter's actual obscenity. Said instructions have been held

to be proper on many previous occasions.

As to the sufficiency of the evidence of scienter, the evidence established that appellant operated a so-called "adult" bookstore 12 hours a day, he had his bondsman, lawyer and Pacific News standing by ready to get him out of jail in "five minutes and defend him." There were signs in front giving notice of the character of the material to be found inside. Appellant was specifically aware of the actual contents of two magazines and of films he had for sale. The arcade movie machines had pictures of nude people on them, and were visible from appellant's position in the store. One person was seen masturbating while viewing a film, and this was visible to appellant. In view of the above Respondent contends that the Petitioner had the requiste scienter necessary and also that the jury instructions were proper.

8. The film upon which Petitioner's

conviction rests is obscene under the First and Fourteenth Amendments and in fact.

9. The Supreme Court of the United States should not take jurisdiction to review a judgment where no opinion was delivered by the highest state court.

The Appellate Department of the Superior Court of Los Angeles County delivered no opinion in this case. Said appellate court therefore did not in any way pass upon any federal questions.

The appellate jurisdiction of the United States Supreme Court over a state court cannot be based upon the supposed denial of a federal right which was not urged in the trial court or called to the attention of or decided by the state appellate court. Cincinnati, N.O. & T.P.R. Co. v. Slade, 216 U.S. 78.

Where the highest court of the state delivers no opinion and it appears that the judgment might have rested upon a non-federal

ground, this Court will not take jurisdiction to review the judgment. Steinbridge v. State of Georgia, 343 U.S. 541.

CONCLUSION

For the foregoing reasons, Respondent submits that this Honorable Court should deny the writ.

Respectfully submitted,

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